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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

GILBERT A. HARING, Lieutenant,
Arlington County Police Department;

HENRY W. ALLEN, Detective;

J. R. BADEY, Detective;

ALVIN BEUCHERT, Officer;

THOMAS TRUMBLE, Officer;

STANLEY GARBER, Officer,

Petitioners,

vs.

JOHN FRANKLIN PROSISE,

Respondent.

On Writ Of Certiorari to the United States
Court of Appeals for the Fourth Circuit

PETITIONERS' BRIEF

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QUESTIONS PRESENTED

Can a person who has pleaded guilty in a state criminal court to manufacturing illegal drugs, and who did not raise the validity of the search that produced the essential evidence of the crime, subsequently bring an action in a federal court under 42 U.S.C. § 1983 claiming that the search was unconstitutional?

a. By pleading guilty in a state criminal court, does a person waive any right to litigate in a § 1983 action the constitutionality of the search which produced the essential evidence of the crime?

b. Does a conviction based upon a plea of guilty collaterally estop the later litigation in a federal court § 1983 action of the search and seizure claim, where the state court expressly found a sufficient factual basis for the plea and that basis was the evidence produced by the search?

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OPINIONS BELOW

The opinion of the United States Court of Appeals For the Fourth Circuit is now reported at 667 F.2d 1133 (4th Cir. 1981), and it is found in the Joint Appendix at pp. 57 through 84. The opinion of the Honorable Albert V. Bryan, Jr. in the United States District Court is unpublished but

is also found in the Joint Appendix at pp. 46 through 56.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A panel of the Fourth Circuit Court of Appeals entered its judgment on December 30, 1981. J.A. at p. 85. A timely petition for rehearing en banc was filed on January 13, 1981, by the petitioners ("police officers"). On March 19, 1982, the petition for rehearing was denied by the panel and the suggestion of a rehearing en banc was denied by an evenly divided court; a poll was taken, and Judges Russell, Widener, Hall, Murnaghan and Chapman voted in favor of a rehearing en banc. J.A. at p. 86. 28 U.S.C. § 1254 (1) is believed to confer jurisdiction on this Court to review the judgment of the Fourth Circuit by a writ of certiorari. The circuit court stayed its mandate pending the application for a writ of certiorari. J.A. at pp. 88 and 90. This Court granted the writ of certiorari on October 12, 1982.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment IV, which provides:

> "The right of the people to be secure in their persons, houses, papers, and

effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment XIV, Section 1, which provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983, which provides:

"Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any

> citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1738 which provides in part:

> "Such Acts, records and judicial proceeding, [of a state] or copies thereof, so authenticated shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

The respondent (Prosise) filed a *pro se* action in the United States District Court for the Eastern District of Virginia claiming that the police officers violated his Fourth and Fourteenth Amendment rights while acting under color of law. Prosise alleged that, pursuant to a warrant, the officers illegally searched and seized certain items in his apartment. The action was based

upon 42 U.S.C. § 1983, and the district court took jurisdiction of the case apparently pursuant to 28 U.S.C. § 1343.

On the day of the search,[1] the officers had earlier responded to a radio call about a domestic disturbance in an apartment occupied by Prosise and his fiancee, Katherine Denny. After the officers arrived, but before they could gain entry, guns were fired in the apartment. As a result of their investigation, Prosise was arrested at the scene for attempting to kill Denny.

Denny stated to the arresting officers that Prosise was "making PCP" (or "angel dust") and she showed them a baggie she said contained PCP and a closet where there were various chemicals and devices. Henry Allen, a narcotics detective, was called to the apartment. He examined the closet, noticed a smell of ether, performed a field test, and concluded that these were chemicals and devices used to make PCP. He then went to a magistrate and obtained a warrant which authorized a search of the entire apartment to find

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[1]These facts are drawn from the opinion of the Fourth Circuit. *Prosise v. Haring*, 667 F.2d 1133, 1134-35 (4th Cir. 1981). They were also set out in the affidavits of the officers in support of their motions to dismiss and for summary judgment and in the particular pleadings and exhibits referred to in the text.

PCP. The affidavit he executed in support of the search is found in the Joint Appendix at pp. 23 through 25. The apartment was searched and the chemicals, apparatus, and receipts showing the purchase of certain chemicals used in the manufacturing of PCP were seized. The chemicals were submitted for expert analysis.

Prosise was later charged with possession of PCP and manufacturing PCP. Prosise entered into a plea agreement whereby the charge of possession was nol-prossed in return for a guilty plea to manufacturing PCP. The plea agreement can be found at pp. 26 through 28 of the Joint Appendix.

A hearing was held in the Arlington County Circuit Court by Judge Charles S. Russell at which Detective Allen took the stand and testified at length about why the search mentioned above was made, what was seized, and the results of the experts' chemical analysis. These pages from the state court transcript are found in the Joint Appendix at pp. 29 through 42. After hearing the details of the search and seizure, the following exchange took place (this exchange was not mentioned in the Fourth Circuit opinion):

> "The Court: Does the Commonwealth have any further evidence?

"Mr. Melson [Deputy Commonwealth's Attorney]: No, sir.

"The Court: Does the defense wish to present any evidence?

"Mr. Rodway [Defendant's attorney]: No, sir.

"The Court: The court finds the plea of guilty to be voluntarily and intelligently tendered *and finds there is a sufficient factual basis; and upon the evidence heard this morning, the court finds the defendant guilty of the manufacture of phencyclidine as charged in the indictment C-12689."* Emphasis added. J.A. 41.

Prosise was sentenced to twenty-five years imprisonment and this conviction is final. J.A. 44. (This was later reduced to twelve years.) Prosise then filed this action for damages in the district court under 42 U.S.C. § 1983 claiming that the search (which provided the factual basis for the conviction) was illegal.[2]

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[2]The district court characterized Prosise's Fourth and Fourteenth Amendment claim in the following way:

(footnote continued)

In support of their motions to dismiss and for summary judgment (J.A. at pp. 20 through 22), the officers provided among other things the plea agreement and the transcript of the hearing where Prosise pleaded guilty. The district court granted the officers summary judgment.

(footnote continues)

> "In his second claim plaintiff attacks the validity of the search warrant obtained by the defendants to authorize the search of plaintiff's apartment. In his complaint plaintiff stated that the search warrant obtained to seize chemicals and devices used to manufacture phencyclidine (PCP) contained "false information" that was used to "set up" the plaintiff. In an attempt at explanation plaintiff asserted that the search warrant was directed at chemicals in the living room whereas in reality they were located in the closet; he further contended that the officers who executed the warrant (defendants Allen and Badey) emptied out some of the contents of the chemical bottles in order to create the appearance of use by the plaintiff. He further charges officers Allen and Badey with seizing chemicals that were not authorized to be seized in the warrant and with moving chemicals around so that they would appear in plain view. Finally, plaintiff maintains that Officer Beuchert exceeded the scope of the search warrant by seizing drugs out of a shirt located in the bathroom." J.A. at pp. 48 through 49.

The district court chose to base its grant of summary judgment on the search and seizure issues upon collateral estoppel and waiver principles.[3] It reasoned that "the plea of guilty necessarily implied that the search giving rise to the incriminating evidence was lawful." J.A. 52. Further, the court concluded that the "reasoning undergirding" this Court's decision in *Tollet* v. *Henderson,* 411 U.S. 258 (1973), precluded Prosise's assertion of the Fourth Amendment claim in this § 1983 action.[4] J.A. at 55. Judge Bryan stated:

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[3]The district court also concluded that it was convinced on the merits that the search and seizure was lawful. J.A. at p. 49. However, it further reasoned that the basis for the grant of summary judgment should be on estoppel grounds rather than on the merits. J.A. at p. 50.

[4]The district court reached its decision before this Court decided *Allen v. McCurry,* 449 U.S. 90 (1980) (collateral estoppel applicable in a subsequent § 1983 action involving a search and seizure). Thus at the time of Judge Bryan's decision, the Fourth Circuit's position on the general issue of estoppel in § 1983 actions involving prior state court criminal convictions was *Rimmer v. Fayetteville Police Department,* 567 F.2d 273 (4th Cir. 1977). *Rimmer* concerned the "actual litigation" of a Sixth Amendment issue in the prior state proceeding and generally embraced the position that collateral estoppel only applies to issues which can be presented in a federal habeas corpus proceeding; this assured a person at least one opportunity to have a federal court review the constitutional issue. This Court in *Allen v. McCurry* rejected this aspect of the *Rimmer* decision.

> "If a defendant who pleads guilty is foreclosed from obtaining his freedom because of an illegal search and seizure, he should not be allowed to secure damages in a § 1983 suit and thereby litigate the antecedent constitutional question relating to the search that could not otherwise be heard because of *Tollett*." J.A. at p. 55.

Prosise appealed the grant of summary judgment to the Fourth Circuit, and that court's decision was rendered on December 30, 1981. The panel reversed the district court and held that Prosise was not barred by his guilty plea from litigating the validity of the search even though it produced the evidence essential to his conviction. The Fourth Circuit in *Prosise* adopted a "flat-rule of nonpreclusion" in § 1983 cases involving guilty pleas for essentially two reasons. First, it concluded that the court in the collateral proceeding would likely be unable to determine fairly and expeditiously in "the run of § 1983 actions" if the criminal defendant had adequate "incentive" to litigate the constitutional issue in the state court; on the balance, the *Prosise* court said, "the game is not worth the candle." *Prosise, supra* at 1142. Second, and more important, because of *Stone v. Powell*, 428 U.S. 465 (1976), "the federal 1983

forum is now the only one available for the assertion of this particular constitutional claim." *Prosise, supra* at 1142.

A petition for rehearing en banc was made. It was argued that the panel's decision overlooked material facts and law, and that a conflict had been created possibly within the Fourth Circuit and definitely between the Tenth and Fourth Circuits.

On March 19th, the panel denied the petition for rehearing, and by an evenly divided court the request for rehearing en banc was also denied. A poll was taken and Judges Russell, Widener, Hall, Murnaghan and Chapman would have granted the rehearing. On March 29, 1982, and again on April 28, 1982, the Fourth Circuit entered an order which stayed the mandate of the circuit court for thirty days, pending application of the officers in the Supreme Court of the United States for a writ of certiorari to the circuit court. On October 12, 1982, this Court entered an order granting the petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

This Court and the Virginia Supreme Court have established the principle that a guilty plea essentially waives the right to later seek one's freedom after conviction based on evidence gath-

ered through an alleged Fourth Amendment violation. The result of the circuit court's *Prosise* decision is that the same person can nonetheless seek money damages under § 1983. Prosise had a "full and fair opportunity" to litigate the search and seizure in state court, but he voluntarily chose to forego it when he entered into a plea agreement. This waiver must be judicially enforced to avoid attacks on otherwise final state criminal convictions. To hold otherwise, as the circuit court did, will allow a state criminal defendant to plead guilty under favorable terms and conditions and then to "forum shop" by going to federal court to raise constitutional claims.

Although the Fourth Circuit established in *Cramer v. Crutchfield*, 648 F.2d 943 (1981) (per curiam), that it will apply waiver or preclusion to unlitigated Fourth Amendment claims where a state criminal trial took place, it has denied similar effect in a case like this where there is guilty plea. The Fourth Circuit decision in *Prosise* is also in conflict with that of the Tenth Circuit in the same matter. *Metros v. United States District Court*, 441 F.2d 313 (1971). The reasoning of *Prosise* decision also conflicts with the principles underlying decisions by the First and Ninth Circuit, for example, in related cases involving unlitigated legal claims and guilty pleas.

More recently, the Fifth Circuit in *Southern Jam, Inc. v. Robinson*, 675 F.2d 94 (1982), held that under the principles of *res judicata* the failure to attack the constitutionality of an ordinance in a state court prosecution precluded the litigation of the ordinance's validity in a later § 1983 action. The result in *Prosise* conflicts with the result in the *Southern Jam* case.

Finally, the *Prosise* decision is at odds with the principles established by this Court in *Tollett v. Henderson*, 411 U.S. 258 (1973) (plea of guilty waives all antecedent constitutional objections), and *Stone v. Powell*, 428 U.S. 465 (1976) (no right to litigate Fourth Amendment issue in federal court by *habeas corpus* if full and fair opportunity to litigate issue given in state court).

Prosise's § 1983 action should be precluded by principles of collateral estoppel and waiver. For all of these reasons, the decision of the Fourth Circuit should be reversed.

ARGUMENT

I. THE DECISION OF THE FOURTH CIRCUIT WILL ENCOURAGE PERSONS CONVICTED ON GUILTY PLEAS TO LITIGATE CLAIMS OF UNLAWFUL SEARCH AND SEIZURE AND TO CHALLENGE THEIR STATE COURT CONVICTIONS THROUGH § 1983 ACTIONS EVEN THOUGH THE SEARCH WHICH PRODUCED THE EVIDENCE WAS THE BASIS FOR THEIR CONVICTION.

The Fourth Circuit's primary reason for its "flat-rule of non-preclusion" in § 1983 actions of issues which were not actually litigated during guilty plea hearings in state court, was that after *Stone v. Powell, supra*, the "§ 1983 federal forum is the only one available for assertion of this particular constitutional claim." *Prosise, supra* at 1142. Although the circuit court recognized that the decision of *Allen v. McCurry*, 449 U.S. 90, 105 (1980), rejected this reason as a sufficient basis for a "blanket rejection of collateral estoppel in § 1983 actions involving Fourth Amendment claims," the circuit court found it nonetheless a legitimate reason "well within conventional doctrine." *Prosise, supra* at 1142. As discussed further below, there is no basis for concluding that there is a greater need to have federal review of Fourth Amendment claims arising in state courts in guilty plea cases than when such claims arise during a state court trial.

This Court is fully aware of the rising amount of § 1983 litigation in the federal courts. The statistics presented in the brief of Amici Curiae show this. The officers respectfully suggest that this kind of litigation will increase if prisoners and other convicted persons are able to seek damages for Fourth Amendment claims when they have pleaded guilty, and in particular even when the evidence produced by the search in issue in the later 1983 action was essential to the conviction.

There are strong public policy interests which require that Prosise's § 1983 action be precluded. First, by holding that waiver or estoppel precludes Prosise's 1983 action, this Court would prevent the creation of a new method by which defendants can indirectly attack the validity of their guilty pleas in state courts.[5]

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[5]Although a person who has pleaded guilty cannot obtain his freedom in a habeas corpus proceeding by raising a search and seizure that resulted in his conviction, he will be able to seek money damages from the officers involved. The quantum of damage should not include compensation for time spent in jail since the incarceration was caused by the commission of the crime. However, it will no doubt be argued that people like Mr. Prosise should be able to seek compensation for time spent in jail since the fruits of the search in question in effect put them there. This Court should not permit convicted persons to recover damages for their incarceration under these circumstances.

There should be finality of judgment, cessation of litigation and a respect for the state court's ability to resolve constitutional issues. To accomplish this, the guilty plea should be given full force and effect. To hold otherwise will disrupt the comity between federal and state courts,

A very important consideration is that a defendant who pleads guilty should not be entitled to greater federal protection than the criminal defendant who fully and fairly litigates constitutional issues in the state court system. As this Court said in *Lefkowitz v. Newsome*, 420 U.S. 283 (1975):

> "A defendant who chooses to plead guilty rather than go to trial in effect deliberately refuses to present his federal claims to the state court in the first instance. *McMann v. Richardson, supra*, at 768, 25 L.Ed.2d 763. Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained." *Lefkowitz v. Newsome, supra*, 420 U.S. at 289.

The criminal defendant who deliberately refuses to follow the orderly procedure for litigating constitutional claims in order to accept the benefits of a guilty plea should not be entitled to the added benefit of unencumbered access to a federal forum.[6] To reward those defendants who plead guilty would create a disincentive to the assertion, and full and fair litigation, of all constitutional claims in the state system.

ARGUMENT II

II. 28 U.S.C. § 1738 ALLOWS THE PRECLUSION OF PROSISE'S § 1983 ACTION.

This Court need not reach the question of precisely how 28 U.S.C. § 1738 would work in a case where the state's law would *deny* preclusive effect to a guilty plea.[7] The petitioners discuss this point here because Prosise has argued that

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[6]Petitioners are aware of the case of *Jordan v. United States* (and certain state defendants), Civil No. 8-750 PNX WPC now pending the United States District Court for Arizona where the 1983 plaintiffs are attempting to pursue Fourth Amendment claims after pleading guilty in state court.

[7]The *Prosise* circuit court admitted, the "exact operation of § 1738 and its relationship to the general policies of *res judicata* in the § 1983 context is not wholly clear." *Prosise v. Haring*, 667 F.2d 1133, fn. 4, 1138 (4th Cir. 1981). The *Prosise* court went on to note that a divergence of views exist "among both courts and commen-

(footnote continued)

Virginia law would not preclude Prosise's civil action. Although Virginia law is not settled on this point, the law in Virginia which does exist indicates a Virginia court would not permit Prosise's civil damage action.[8] What Prosise would have this Court believe is that the very same Virginia court which found that the search provided the factual basis for the conviction would allow Prosise to attack that conviction by claiming the search was unconstitutional.

(footnote continues)

tators." *Id.* Serious problems of uniformity in the federal circuits would result if every state's rule of collateral estoppel were automatically followed because of the differences in the states' law. This Court may have answered some of these concerns in *Kremer v. Chemical Construction Corp.*, ___ U.S. ___, 102 S.Ct. 1883 (1982). (§ 1738 requires federal court to use *res judicata* rule of state court which has effect of precluding Title VII federal action.)

[8]In adopting a flat-rule of non-preclusion as to unlitigated issues in guilty plea cases, the Fourth Circuit said such a rule "is conformable under 28 U.S.C. § 1738 to Virginia decisions respecting the preclusive effect of its criminal judgments." *Prosise, supra* at 1142. If this is meant to imply that Virginia would deny preclusive effect to Prosise's guilty plea in these circumstances, the petitioners would argue that such a conclusion is without support. See the text above. Petitioners interpret the Fourth Circuit's statement as simply recognizing the fact that the Virginia Supreme Court has not had an occasion to issue a published opinion on the specific issues presented in *Prosise*.

The Virginia Supreme Court held in *Eagle, Etc. Insurance Co. v. Heller*, 149 Va. 82, 140 S.E. 314 (1927), that it would, given adequate justification, invoke collateral estoppel despite the usual rule of mutuality. Estoppel was used defensively in the *Eagle v. Heller* case, when a convicted arsonist tried to recover on a fire insurance policy on the very house he burned.

More recently the court indicated in *Luke Construction Company v. Simpkins*, 223 Va. 387, 291 S.E.2d 204 (1982) (per curiam), that there are circumstances other than that of the *Eagle v. Heller* case where it would apply collateral estoppel despite the lack of mutuality. Hence, *Eagle v. Heller, supra*, does not represent a "single limited exception to this general rule of non-preclusion...."[9] Although Prosise argues in his Opposition Brief that Virginia's law of estoppel only

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[9]Prosise's argument that there was other "evidence independent of the search" (Opposition brief at page 8) that could have supported the plea cannot be taken seriously. Prosise provides no citation to any part of the record which would tend to support such a claim. The claim is directly contrary to the state court's express finding that the factual basis of the plea of guilty was the evidence produced by the search (J.A. at p. 41) and ignores the difficult burden on the prosecution to prove the act of manufacturing drugs. The chemicals, apparatus and experts' analysis of the chemicals would be needed to convict.

applies to issues "actually litigated" and thus would never apply to a guilty plea situation, Virginia has never issued a published opinion on what issues, if any, might be necessarily decided by a guilty plea.[10] If one assumes that Virginia would be inclined to follow the "conventional" estoppel doctrine then one would expect Virginia to apply estoppel in at least some cases involving guilty pleas; even the *Prosise* court admits that the "conventional - or at least plainly emerging" doctrine of estoppel would provide preclusive effect after a guilty plea to the elements of the crime. *Prosise, supra* at 1140; see also *Ideal*

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[10]The officers have found one unpublished case where the Virginia Supreme Court has considered the preclusive effect of a guilty plea. In *Souders v. Gabrielson, et al.*, Record No. 741124, the Virginia Supreme Court denied a writ of error to a July 18, 1974, judgment of Charles S. Russell of the Arlington County Circuit Court (Law No. 15840). Judge Russell is now a member of the Virginia Supreme Court. The circuit court held that the civil plaintiff's prior plea of guilty to drunk in public and assault and battery of the arresting officers precluded the plaintiff's subsequent damage action against the arresting officers for unlawful use of force. The Virginia Supreme Court said that it reviewed the record in the circuit court and found "no reversible error." See the appendix to the Reply Brief for the plea of estoppel and res judicata, the circuit court's order sustaining the plea of *res judicata* and estoppel, the notice of appeal and assignments of error and the Virginia Supreme Court's denial of the writ of error.

Mutual Insurance Co. v. Winker, 319 N.W.2d 289 (Iowa S.Ct. 1982) (reversing earlier decisions, the court embraced issue preclusion as applicable to elements of the criminal conviction based on a guilty plea).

There are two additional elements present in *Prosise* which distinguish it from those Virginia cases mentioned by the Fourth Circuit as being recent statements of Virginia law of collateral estoppel. See, e.g., *Aetna Casualty & Surety Co. v. Czonka*, 200 Va. 385, 105 S.E.2d 869 (1958), as referred to in *Prosise* at 1139.

The first element in *Prosise* is the substantial identity of the parties in the criminal prosecution and in the subsequent § 1983 action. See *Moran v. Mitchell*, 354 F.Supp. 36 (E.D. Va. 1973). (The police officers who were sued in a 1983 action were deemed to be the same parties in earlier state court prosecution because of the identity of interest between the state and its police.) The second element is that the "causes of actions" in the two proceedings are also substantially the same. According to the Virginia Supreme Court the scope of "cause of action" varies "with its context and is broadly characterized as an assertion of particular legal rights which have arisen out of a definable factual

transaction." *Bates v. Devers*, 214 Va. 667, n. 8, 672, 202 S.E.2d 917, at n. 8, 921 (1974).

The presence of these elements suggests that Virginia would apply the broader doctrine of *res judicata*. In a similar situation, the Fifth Circuit recently examined the effect of *Allen v. McMurry* and concluded that "as long as the parties had a full and fair opportunity to litigate their constitutional allegations in the prior state court proceedings [citation omitted], the defense of *res judicata* is viable in a subsequent § 1983 action." *Southern Jam, Inc. v. Robinson*, 675 F.2d 94, 97 (5th Cir. 1982). In *Southern Jam*, the circuit court applied Georgia law. Because the 1983 plaintiff had failed to raise any constitutional objections to an ordinance in a prior state court enforcement proceeding against the plaintiff, the plaintiff was barred by *res judicata* from raising the constitutional issues in the 1983 action.

The doctrine of *res judicata* applied in the *Southern Jam* case, is also applicable to the *Prosise* case. Virginia, like Georgia, also follows the rule that *res judicata* bars the subsequent litigation of all claims that were or could have been litigated in an earlier action between the same parties provided the claims arise from the same "cause of action."

Unfortunately there has been no authoritive determination by Virginia of the precise effects of collateral estoppel and waiver[11] after a guilty plea. Because of this, § 1738 allows this Court to establish a rule of preclusion to be applied in the federal courts in such circumstances. Using existing Virginia law and recent case law developments elsewhere as a guide, it appears that the Virginia Supreme Court would give preclusive effect to Prosise's guilty plea. This Court would not be denying full faith and credit to Prosise's conviction if the Court chose to give it preclusive effect as to issues raised in Prosise's § 1983 action in federal court.

III. THE PANEL FAILED TO CONSIDER THE EXPRESS FINDING BY THE STATE COURT THAT THE SEARCH AND SEIZURE WAS THE BASIS OF THE CONVICTION AND IT GAVE PRIMARY IMPORTANCE TO THE LACK OF A FEDERAL FORUM FOR THE § 1983 CLAIM.

The lengthy testimony about the search and seizure and the express finding by the state trial court that the facts revealed by the search and seizure formed the basis of the finding of guilt are

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[11]The Fourth Circuit rejected the use of the doctrine of waiver simply on the grounds it was only applicable to subsequent *habeas corpus* proceedings. *Prosise, supra* at 1136-37. The court did not discuss the question of whether Virginia would apply the principles of waiver to the case at bar. Virginia law is clear that a guilty plea in a criminal case waives the right to contest all but jurisdictional issues. See *Kibert v. Commonwealth*, 216 Va. 660, 664, 222 S.E.2d 790, 793 (1976).

the most important facts in the case at bar. These facts are not mentioned in the Fourth Circuit's opinion. Rather than restrict its decision to cases such as the instant one, where the state court record makes it abundantly clear which issues were and were not necessarily decided by the guilty plea, the panel lumps all guilty pleas together.

It is difficult to understand how the Fourth Circuit reached its conclusion that in guilty plea cases it is likely that one could not determine fairly and expeditiously whether a criminal defendant had adequate "incentive" to make a suppression motion. For example, the Fourth Circuit admits in the preceding sentence that "the question could always be resolved in the usual processes, many times fairly and occasionally even rather easily...." *Prosise, supra* at 1141-42.

If Prosise with the aid of his counsel had any reasonable belief that the search was illegal, then Prosise had adequate incentive to contest the search. He chose not to do so even though at stake was up to forty years imprisonment. See Va. Code Ann. § 18.2-268. There is no doubt but that Prosise's conviction for manufacturing PCP could not have been obtained without the chemicals, devices, receipts of purchases of chemicals, and experts' analyses of this seized evidence in this case.

The Fourth Circuit assumes, without any basis, that in most all guilty plea situations there is likely to be some incentive *not* to make a suppression motion or that some injustice occurred in the state court. Underlying the Fourth Circuit's decision in *Prosise* is an implicit distrust of the state court system. This distrust is evident at page 1142 of its opinion where the court states that the "more important" reason for adopting a general rule of non-preclusion is that the "§ 1983 federal forum is the only one available for assertion of this particular claim." *Prosise, supra* at 1142. In essence, the circuit court has ignored *Stone v. Powell, supra,* and *Allen v. McCurry, supra.*

In *Stone v. Powell,* the Court held that Fourth Amendment claims which were capable of being fully and fairly litigated in state court could not be reasserted in federal *habeas corpus* proceedings. Some courts construed *Stone v. Powell* to make collateral estoppel inapplicable to § 1983 actions involving Fourth Amendment claims based on a general belief that there must be at least one unencumbered right to litigate such an issue in a federal court. See *McCurry v. Allen,* 606 F.2d 795 (8th Cir. 1979).

But this reasoning was flatly rejected by the Court in *Allen v. McCurry, supra*. The Court in *McCurry* said that preclusion cannot be denied a state court judgment out of a distrust of the ability of state courts to correctly decide constitutional issues. Section 1983 is now the only hope of pursuing this particular claim because Prosise voluntarily chose not to assert the claim in the state court. As the *McCurry* Court said, there is no principle whereby a person has a universal right to litigate a constitutional claim in federal court, and the error of the panel's opinion is that it seeks to create such a right. *McCurry* at 105. Moreover, there is nothing in the legislative history of § 1983 which indicates that Congress intended to deny binding effect to a state court judgment when the parties had a full and fair opportunity to be heard. *McCurry* at 104.

Prosise argued in his Opposition that the Fourth Circuit did not overlook the express finding of the state court that the search and seizure was the very basis of the conviction "but rather, rejected such an analysis in favor of a general rule of non-preclusion." Prosise went on to say that the Fourth Circuit simply "rejected the factual basis of the plea as a useful way of determining the preclusive affect to be given his plea." Respondent's Opposition brief at pp. 10-11.

A court which examined the record in the state court would not have adopted a "flat-rule" of non-preclusion for search and seizure issues in guilty plea cases. If a court did examine the record closely in the case, it would fully appreciate the ease with which one could see the importance the search played in Prosise's criminal case (and hence incentive to litigate). Thus there is less logic to the following conclusion:

> ."The question [of incentive to litigate in a guilty plea case] is so likely to be one incapable of fair and expeditious resolution in the run of § 1983 actions that we believe a rule of non-preclusion should obtain with respect to search and seizure issues in guilty plea cases." *Prosise, supra* at 1142.

Such an inflexible rule deals with no discernable judicial concerns and certainly is not compatible with the Virginia Court's view that preclusion will apply in "appropriate circumstances." Such a rule will surely increase the workload of the federal courts by requiring the full litigation of illegal search and seizure claims in instances where any court would easily find that the fruits of the searches were crucial to the conviction and clearly satisfy itself that the criminal had incentive to litigate "to the hilt."

A. PROSISE'S GUILTY PLEA IN STATE COURT WAIVED HIS RIGHT TO ALLEGE A CONSTITUTIONAL VIOLATION IN A SUBSEQUENT 1983 ACTION.

It is a well settled principle of federal law that a criminal defendant who pleads guilty waives the right to raise antecedent constitutional objections in subsequent proceedings. *Tollett v. Henderson,* 411 U.S. 258 (1973). This is also the rule in Virginia. *Kibert v. Commonwealth,* 216 Va. 660, 664, 222 S.E.2d 943 (1976). As this Court stated in *Tollett:*

> "We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea...." 411 U.S. at 267.

The issue in *Prosise* is whether this principle of waiver should apply to a Fourth Amendment claim which could not be brought in a *habeas* petition but is brought in a § 1983 action.

The district court approached the *Prosise* case in this manner. It noted that under *Menna v. New York,* 423 U.S. 61 (1975) (per curiam), a guilty plea "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." J.A. at p. 54. The district court reasoned that great significance must attach to a criminal defendant's decision to plead guilty, and stated:

> "If a defendant who pleads guilty is foreclosed from obtaining his freedom because of an illegal search and seizure, he should not be allowed to secure damages in a § 1983 suit and thereby litigate the antecedent constitutional question relating to the search that could not otherwise be heard because of *Tollett*. The Court thus concludes that plaintiff's Fourth Amendment claim cannot be maintained

> in this § 1983 action under the reasoning undergirding the *Tollett* decision." J.A. at p. 55.

The Fourth Circuit in *Prosise* rejected the application of this waiver principle, and said that it applies "only to subsequent *habeas corpus* proceedings challenging the criminal conviction."

The rejection of a waiver principle by the Fourth Circuit in *Prosise* cannot be reconciled with that same court's analysis and holding in *Cramer v. Crutchfield*, 648 F.2d 943 (4th Cir. 1981) (per curiam). Cramer filed a Section 1983 action for damages and claimed that a police officer who arrested him for illegally having a radar device had violated Cramer's constitutional rights when the officer searched the cab of Cramer's truck and seized the radar device. Cramer was tried and convicted in state general district court of equipping his vehicle with a radar device in violation of Va. Code § 46.1-198.1. Cramer did not assert in his trial that his Fourth Amendment rights had been violated. The federal district court in *Cramer* dismissed Cramer's 1983 claim of an unconstitutional search and seizure.

The Fourth Circuit affirmed the dismissal and said:

> "But Cramer did not object to the evidence derived from the search or move to suppress it at his trial in the Prince George County District Court. *He therefore waived any challenge to the constitutionality of the search.*" *Cramer, supra,* at 945. Emphasis added.

This same reasoning applies to *Prosise;* like the seizure of the radar device in *Cramer,* the state court record in *Prosise* also showed that the search and seizure of the chemicals, devices, and receipts of drug purchases were essential to Prosise's conviction. Despite this similarity of facts in *Cramer* and *Prosise,* the *Prosise* panel inexplicably states:

> "In *Cramer* it was manifest from the record that the evidence used to convict in the state criminal prosecution was that obtained by the search and seizure which formed the basis for the Section 1983 action. This made equally manifest the Section 1983 plaintiff's 'adequate incentive' to seek its suppression in the state action. *It is precisely because the guilty plea obscures what was manifest in Cramer*

that we hold here against preclusion."

Fn. 15 at 1142. Emphasis added.

But even a casual examination of the record in *Prosise* shows that the search was essential to Prosise's plea and that he had "adequate incentive." The ability of a court to determine the impact of a particular constitutional issue on a conviction and hence the adequacy of the incentive to litigate, would not be substantially more difficult in guilty plea cases than it is where a trial took place. It certainly is not here. The point of distinction advanced by the Fourth Circuit is misconceived.

B. PROSISE'S § 1983 ACTION IS ALSO PRECLUDED UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL.

The *Prosise* court begins with the observation that *McCurry* forbids the application of any collateral estoppel doctrine except a "conventional one," and assumes that the application of preclusion in a guilty plea case is not conventional. *Prosise, supra* at 1137. But the Court in *McCurry* said only that the issue before them concerned an example of the "conventional doctrine." Rather than describing what was or was not "conventional" doctrine or what might obtain in other cases, the Court expressed no opinion and certainly did not forbid the application of collateral estoppel to issues involved in guilty plea cases.

Moreover, the use of issue preclusion in guilty plea cases where the search and seizure issue was essential to the state conviction is not "new" nor is it harsher (or more "stringent") than the preclusion that obtains when a trial took place but the issue was not raised. For example, it was used in 1969 in *Palma v. Powers*, 295 F. Supp. 924 (N.D. Ill.) (because the evidence was essential to conviction, the plaintiff in a Section 1983 action held precluded from relitigating a search and seizure). In 1971 the Tenth Circuit in *Metros v. United States District Court*, 441 F.2d 313, held that the plaintiff in a § 1983 action against officers who searched plaintiff's apartment pursuant to a warrant was precluded from alleging there was no probable cause to support the warrant. The plaintiff had earlier pleaded guilty in state court; the court said that "a guilty plea is conclusive as to all but jurisdictional issues." *Id.* at 317. In 1972, the Seventh Circuit in *Williams v. Liberty*, 461 F.2d 325, expressed its approval of *Palma v. Powers*, and this precise rule of preclusion was applied in *Hooper v. Guthrie*, 390 F. Supp. 1327 (W.D. Pa. 1975). In *Ford v. Manion*, 529 F.Supp. 373 (N.D. N.Y. 1982), the court reached the exact opposite conclusion than did the *Prosise* court after extensive review of *Allen v. McCurry*.

Some courts have applied preclusion to civil actions based on a prior guilty plea where the issue was an element of the offense. See *Fontneau v. United States*, 654 F.2d 8 (lst Cir. 1981) (taxpayer's plea of guilty to tax evasion bars relitigation of issue of fraud when taxpayer brought a late suit for refund); *Brazzell v. Adams*, 493 F.2d 489 (5th Cir. 1974) (§ 1983 action claiming illegal entrapment in an earlier state criminal case was held to be barred).

Guilty pleas have provided the basis for estoppel (or waiver) in other contexts. For example, in *United States v. $31,697.59 Cash*, 665 F.2d 903 (9th Cir. 1982),[12] the court held that defendants who had pleaded guilty to a criminal charge involving filing false reports when bringing monetary instruments into the county were collaterally estopped from trying to stop the forfeiture

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[12]See also, *Larios-Mendez v. Immigration and Naturalization Service*, 597 F.2d 144 (9th Cir. 1979) (person's plea of guilty to a charge of aiding and abetting the illegal entry of aliens would stop the assertion of a Fourth Amendment claim of illegal stop in a subsequent civil deportation proceeding against that same person); and *United States v. One 1973 Dodge Van*, 416 F.Supp. 43, 46 at n. 1 (E.D. Mich. 1976) (car owner's plea of guilty to carrying illegal drugs in his car was a waiver of his right to later contest the constitutionality of his arrest and search of his car in a subsequent forfeiture proceeding).

of the instruments on the grounds their pleas were involuntary under Fed.R.Crim.P. 11(f). The court reasoned that a claimant who "by-passes opportunities to raise a claim in one forum should not be able to raise it in a collateral forum without a showing of any special circumstances." *Id.* at 906.

CONCLUSION

The officers have discussed above how the *Prosise* decision conflicts with decisions of other circuit courts. The fact that a conflict exists is not a reason to decide a case one way or another. But when one examines the points of distinction between the Fourth Circuit and the other courts, it can be seen that the reasoning supporting the *Prosise* decision is not persuasive. The Fourth Circuit is in error when it says that a court would likely be unable to fairly and expiditiously determine in most § 1983 actions if there was adequate incentive to litigate the issues in the criminal case. The task is not significantly more difficult where a trial has taken place (see *Cramer v. Crutchfield, supra*) or where the trial court must determine if the issue in the § 1983 action was an "element" of the criminal conviction. See *Brazzell v. Adams, supra*.

The *Prosise* decision loses sight of the real situation this case presents. There is nothing inherently unfair about attaching great signi-

ficance to a guilty plea to the commission of a serious offense.

The Fourth Circuit should have recognized that the federal court hearing Prosise's § 1983 action would be able to examine the state court record and determine the adequacy of the incentive to litigate for purposes of collateral estoppel. When the record in the state court clearly shows that the search in issue in the § 1983 case provided the basis for the conviction, it is plainly wrong to allow the convicted person to litigate that search. The circuit court also states that the "more important" reason behind its general rule of non-preclusion is its belief that since *Stone v. Powell*, 428 U.S. 465 (1976), the "§ 1983 federal forum is now the only one available for the assertion of this particular constitutional claim." *Prosise, supra* at 1142. This kind of reasoning can be characterized as an implicit distrust of the state court system; it shows a continued belief that every person must have at least one opportunity to pursue constitutional issues in federal courts. This rule is directly at odds with the principles set out in *Allen v. McCurry, supra, Stone v. Powell, supra,* and *Tollett v. Henderson, supra.*

There is no sufficient reason for permitting damage claims when those same persons are foreclosed from obtaining their freedom through *habeas corpus*. When a person pleads guilty in circumstances like Prosise's, it is proper to consider the plea a waiver of any further right to attack the search which provided the factual basis for the criminal conviction.

Significant judicial resources will be expended unnecessarily if the Fourth Circuit's decision is not reversed. The effect of a general application of the *Prosise* court's opinion would be to undermine severely state court criminal convictions, and to increase unnecessarily burden of the federal courts. For all of these reasons, this Court should reverse the Fourth Circuit Court of Appeals.

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